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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. 174.

THE CITY OF YOUNGSTOWN,
Petitioner,

vs.

THE ERIE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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We believe that the mere statement of the case will show that there is nothing in this record deserving review by this Court.

The subject matter is a claim of the City of Youngstown, Ohio, against the Erie Railroad Company which the City filed in proceedings for reorganization of that company under Section 77 of the Bankruptcy Act. Confirming a report of a special master, the District Court disallowed the claim and the Circuit Court of Appeals affirmed this decision (Transcript of Record, page 87) (133 Fed. 2d 730).

The claim alleged by the City was a contingent one growing out of a proceeding brought by the City against the Railroad Company in 1922 to compel the elimination of the Watt Street grade crossing in Youngstown. The Common Pleas Court of Mahoning County, Ohio, in said proceeding approved plans for the elimination of the grade crossing by means of a highway bridge over the railroad tracks and decreed that the expense of the improvement and all damages arising therefrom should be borne 65%

by Erie Railroad Company and 35% by the City, and "that the City of Youngstown shall have charge of all claims for damages growing out of said improvement."

In 1928 a judgment in the amount of $47,000 was rendered against the City in favor of The Standard Plate Glass Company in a suit in the State Court for damages to its property abutting on the elimination project. The Erie was not a party to this action. The City paid the amount of the judgment to the Plate Glass Company and the Erie thereafter paid 65% of this amount to the City.

This $47,000 judgment was for—

> "the total damages resulting to the premises described * * * including the building thereon * * * (from the construction of) the improvement, its abutments, approaches, and the change of grade in Watt Street, the taking of any portion of said land or building, and the value of any right incident to said property thereby taken, in the amount of $47,000 * * *." (Transcript of Record, page 38.)

During all of this time The Mahoning Savings and Trust Company was the owner of a mortgage upon the premises in question, given to it by the Plate Glass Company as security for a loan.

The Plate Glass Company having become insolvent in the meantime, this mortgagee in 1932 brought an action against the City in the State Court for damages for the impairment of its mortgage security suffered through the grade elimination project. That litigation is still not finally terminated and the City in the meantime filed in the Bankruptcy Court in the Erie's reorganization proceedings its contingent claim for reimbursement by the Erie of 65% of any final judgment which might thereafter be rendered against the City in the pending action of the mortgagee.

The report of the Special Master in the instant case contains finding of facts (Transcript of Record, page 60), (1) that the City was aware of the existence of the mort-

gage at the time of the $47,000 judgment in favor of the Plate Glass Company, and (2) that the City itself made the claim in the damage action brought against it by the mortgagee bank that the City paid the money to the Plate Glass Company under terms of an understanding between the City and the mortgagee bank that this was the manner in which the bank wished the money paid. The Erie knew nothing of the mortgage or of any such understanding between the Bank and the City as to method of payment. (Transcript, page 70.)

The Circuit Court of Appeals held that the City had no valid claim against the Railroad Company, contingent or otherwise, that the obligation of the Erie under the elimination decree was to pay 65% of the damages to the abutting property, that the judgment for $47,000 had been a judicial determination of the amount of the damages suffered by the property in question, that the Erie had performed its legal obligation under the decree in full by contributing its 65% of such total damages and that, if the City did not properly protect itself in the litigation and paid some of the money to the wrong party under an informal understanding and without getting a proper and binding release from the mortgagee, it had no claim for reimbursement from the Erie for any additional expense caused to it by its own negligent fault.

The same conclusion was reached, incidentally, by the State court in still another suit, a foreclosure action which was brought by the mortgagee as a companion case to its action against the City for damages. The foreclosure case has long since come to final judgment and the State Court of Appeals commented, as quoted by Judge Hicks in his opinion, that the Railroad "was bound only to pay 65% of the cost of the improvements and damages, that it was the City's duty to make all disbursements and to see to their proper application, and if the City made a misapplication it only was liable."

This possibly was a dictum, and, as Judge Hicks said in the opinion, was in any event not binding on the Federal Court. But at least it discloses that the opinion of the State court was in conformity with that of the Federal Court on the only question in the instant case, a question of fact for the trier of the fact, to-wit, the meaning of the original elimination decree of the State Court as to whether it imposed any liability upon the Erie to pay to the City in addition to its share of the cost of the improvement and damages, 65% of any additional liabilities incurred by the City through its own negligence and fault.

There can hardly be any question but that all of these courts were right on this question of fact and that the Erie has already paid the City everything contemplated in that grade elimination decree. And there can likewise be no question but that the correctness or incorrectness of such determination of fact is not subject matter deserving review by this Court.

Respectfully submitted,

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